Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012	)	WT Docket No. 19-250 RM-11849
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

COMMENTS OF EXTENET SYSTEMS, INC.

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EXECUTIVE SUMMARY

ExteNet Systems, Inc., and its subsidiaries, ("ExteNet"), the largest independent provider of distributed network systems in the United States, supports the Petition for Declaratory Ruling filed by CTIA – The Wireless Association® (the "CTIA PDR") and the Petition for Declaratory Ruling and Petition for Rulemaking filed by WIA – The Wireless Infrastructure Association (the "WIA PDR" and "WIA PFR," respectively). The CTIA and WIA filings request critical relief that will protect the pole attachment rights of wireless attachers like ExteNet under Section 224 of the Communications Act of 1934, as amended (the "Act"), as well as their right to implement eligible facilities requests ("EFRs") under Section 6409(a) of the Spectrum Act of 2012.

The Commission has recognized that timely access to utility poles is essential for wireless broadband deployment, including 5G. Nevertheless, some utilities continue to deny ExteNet and others such access – thereby significantly delaying and/or increasing the costs of deployment of wireless facilities. Commission intervention is necessary to stop these practices. As a first step, and as requested in the CTIA PDR, the Commission should (i) clarify that the term "pole," as used in Section 224, includes light poles; (ii) reaffirm that Section 224 does not allow utilities to impose blanket prohibitions on installations of wireless equipment, whether on parts of poles or the entirety of poles; and (iii) clarify that utilities are prohibited from demanding terms of attachment that conflict with the Commission's pole attachment rules. These steps are consistent with Section 224 and the Commission's implementing rules, and will promote rapid wireless broadband deployment.

Unfortunately, obstructive utility behavior is not limited to the matters raised in the CTIA PDR. Some utilities prohibit deployers like ExteNet from installing anything but their antennas on a pole, with no capacity, safety, reliability or engineering rationale for doing so. Further, at least one large utility has told ExteNet that it must pay market pole attachment rates when attaching its facilities to replacement poles, even where the original pole would have been subject to Commission-regulated rates *and* ExteNet agrees to pay the cost of the replacement pole. Other utilities are requiring ExteNet to pay excessively high pole attachment rates for strand-mounted antennas, as if the antenna were affixed to the pole. These practices are not supportable under Section 224, nor can they be squared with the Commission's pro-deployment objectives for 5G or wireless broadband generally. The Commission can and should declare as much in this proceeding.

Lastly, ExteNet generally endorses the Section 6409(a) relief requested in the CTIA PDR, the WIA PDR and the WIA PFR. In that regard, the Commission should make it absolutely clear that Section 6409(a) and the Commission's implementing regulations apply to all state and local authorizations required to deploy new or replacement transmission equipment on existing wireless towers or base stations, including poles with an existing approved antenna. In addition, as raised by the WIA PDR, and consistent with what the Commission has already done with respect to Sections 253 and 332(c)(7) of the Act, the Commission should amend its rules to provide that all local government fees charged for processing EFRs must be cost-based.

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COMMENTS OF EXTENET SYSTEMS, INC.

ExteNet Systems, Inc., and its subsidiaries, ("ExteNet") hereby respond to the Commission's Public Notice released September 13, 2019, seeking comment on the above-captioned Petition for Declaratory Ruling filed by CTIA – The Wireless Association® ("CTIA") and the above-captioned Petition for Declaratory Ruling and Petition for Rulemaking filed by WIA – The Wireless Infrastructure Association ("WIA").[1] For the reasons set forth below, the Commission should grant and expand upon the pole attachment relief CTIA requested in its Petition for Declaratory Ruling, and otherwise grant all of the above-captioned petitions.[2]

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[1] *Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling, and CTIA Petition for Declaratory Ruling*, Public Notice, WT Docket No. 19-250 *et al.*, DA 19-913 (rel. Sept. 13, 2019). *See also Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250 *et al.*, DA 19-978 (rel. Sept. 30, 2019) (extending comment and reply comment deadlines to October 29, 2019 and November 13, 2019, respectively).

[2] The CTIA Petition for Declaratory Ruling is hereinafter referred to as the "CTIA PDR." The WIA Petition for Declaratory Ruling and Petition for Rulemaking are hereinafter referred to as the "WIA PDR" and the "WIA PFR," respectively. For the reasons discussed in the CTIA PDR

INTRODUCTION

ExteNet is the largest independent provider of distributed network systems ("DNS") in the United States. DNS facilities include individual nodes in a distributed antenna system ("DAS") network, stand-alone small cells that are not part of a DAS network, and similar small wireless deployments that satisfy the conditions in Section 1.6002(l) of the Commission's rules.[3] ExteNet has deployed large outdoor DNS networks in a substantial number of metropolitan areas throughout the country, operating thousands of wireless nodes and maintaining thousands of route miles of fiber nationwide.[4] ExteNet's DNS facilities provide coverage, capacity, and network densification that is essential for current wireless service and for the transition to nationwide 5G service.

ExteNet's DNS facilities include attachments to utility poles covered by Section 224 of the Communications Act of 1934, as amended (the "Act");[5] eligible facilities requests ("EFRs") covered by Section 6409(a) of the Spectrum Act of 2012;[6] and installations of facilities covered by Section 332 of the Act.[7] While Section 6409(a) and Section 332 rights are necessary to facilitate rapid DNS deployment – and thus ExteNet supports the Section 6409(a) relief requested in the CTIA PDR, the WIA PDR and the WIA PFR – ExteNet is especially concerned about its pole attachment rights under Section 224. This is because each individual DNS node

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and WIA PDR, ExteNet agrees that the Commission has the necessary authority to issue a declaratory ruling on the matters raised in those filings and on the additional matters raised herein. *See* CTIA PDR at 32-33; WIA PDR at 24.

[3] 47 C.F.R. § 1.6002(l).

[4] ExteNet is a certified telecommunications utility in 45 states and in the District of Columbia.

[5] 47 U.S.C. § 224.

[6] Section 6409(a) is codified at 47 U.S.C. § 1455(a).

[7] 47 U.S.C. § 332.

facility has a much smaller coverage area than a macro tower, and therefore they must be deployed in many locations at sufficient height to operate effectively. As a result, attachment to utility poles is often the *only* way that ExteNet can efficiently deploy DNS facilities that provide the required signal coverage. Indeed, the company has over 350 pole attachment agreements with over 200 utilities, including nearly all investor-owned utilities in the United States. These agreements provide ExteNet with attachment rights to over 75 million poles. Accordingly, where ExteNet is unlawfully denied access to utility poles on just and reasonable rates, terms and conditions, its DNS deployments, and ultimately the transition to 5G in ExteNet's markets, could be compromised. ExteNet thus has a direct and immediate interest in the pole attachment issues raised in the CTIA PDR and, more generally, the Section 6409(a) issues raised in all three petitions.

DISCUSSION

ExteNet supports CTIA's request for clarification that the term "pole," as used in Section 224 of the Act, includes light poles.[8] ExteNet also supports CTIA's request for reaffirmation that Section 224 does not allow utilities to impose blanket prohibitions on installations of wireless equipment, whether for parts of poles or the entirety of poles.[9] The Commission should likewise grant CTIA's request for clarification that utilities cannot demand terms of attachment that conflict with the Commission's pole attachment rules.[10]

ExteNet is finding, however, that utilities are interpreting Section 224 beyond the plain letter of the law and in contravention of this Commission's rulings. The Commission should

[8] CTIA PDR at 21-25.

[9] *Id.* at 25-27.

[10] *Id.* at 28-31.

address these additional matters when resolving the CTIA PDR, both to promote administrative efficiency and elimination of anti-competitive utility behavior as quickly as possible.

Lastly, ExteNet generally endorses the Section 6409(a) relief requested in the CTIA PDR, the WIA PDR and the WIA PFR. In particular, per the WIA PDR, the Commission should make it absolutely clear that Section 6409(a) and the associated Commission rules apply to all state and local authorizations required to deploy new or replacement transmission equipment on existing wireless towers or base stations, including poles with an existing approved antenna.[11] Further, consistent with the WIA PFR, the Commission should amend its rules to provide that all local fees charged for processing EFRs must be cost-based.[12]

I. THE COMMISSION SHOULD GRANT THE POLE ATTACHMENT RELIEF REQUESTED IN THE CTIA PDR.

While the Commission has made significant progress in addressing pole attachment issues, more remains to be done if the Commission's broadband deployment objectives (including rapid deployment of 5G) are to be realized. The Commission's stance is clear: "Now, more than ever, access to [utility poles] must be swift, predictable, safe, and affordable, so that broadband providers can continue to enter new markets and deploy facilities that support high-speed broadband. Pole access also is essential to the race for 5G because mobile and fixed wireless providers are increasingly deploying innovative small cells on poles and because these wireless services depend on wireline backhaul."[13] Yet, as Chairman Pai has noted, "[f]or

[11] WIA PDR at 5-7.

[12] WIA PFR at 11-13.

[13] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7706 ¶ 1 (2018) (footnote omitted) ("*Wireline Infrastructure Third R&O*").

companies of any size, pole attachment problems represent one of the biggest barriers to broadband deployment."[14]

The CTIA PDR illustrates the problem. CTIA cites a variety of examples where, notwithstanding the Commission's efforts on pole attachment reform, utilities are charging exorbitant fees for light pole attachments or prohibiting such attachments altogether.[15] CTIA further highlights how utilities impose blanket bans on wireless pole installations that effectively deny wireless providers the pole access they need in order to efficiently deploy their facilities.[16] And, CTIA points to instances of how utilities may use their negotiating leverage to force attachers to surrender their rights under the Commission's pole attachment rules.[17] Therefore, the Commission should expeditiously grant the pole attachment relief requested in the CTIA PDR.

A. The Term "Pole" Should Be Interpreted As Including Light Poles.

The Commission should declare that the term "pole" as used in Section 224 includes light poles, and that such poles are subject to the nondiscriminatory access and other requirements of Section 224 and the Commission's pole attachment rules.[18] As CTIA points out, Section 224 does not define the term "pole."[19] Thus, the Commission has discretion to define "pole" in a manner that is consistent with the statute and the policies supporting it.[20] Defining "pole" to

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[14] *Id.* at 7818 (Separate Statement of Chairman Ajit Pai).

[15] CTIA PDR at 22.

[16] *Id.* at 26-27.

[17] *Id.* at 28.

[18] *Id.* at 23.

[19] *Id.*

[20] It is well settled that that the Commission has the authority to interpret the Act and clarify its provisions. *See, e.g., Nat'l Cable & Telecomms Ass'n v. Gulf Power Co.*, 534 U.S. 332, 339 (2002) ("as a general rule agencies have authority to fill gaps where the statutes are silent")

include light poles is reasonable and consistent with the plain language of Section 224(f)(1), which requires a utility to provide nondiscriminatory access to "any pole" that the utility owns or controls.[21] A light pole falls within the ambit of "any pole." Defining "pole" to include light poles thus does not expand the scope of Section 224. Rather, it merely makes clear what is already implicit in the statute.[22]

Reading "pole" as including light poles also will ensure that the Commission's implementation of Section 224 remains current with industry developments and the state of technology in wireless broadband. This is especially so with respect to wireless broadband deployments that rely on millimeter wave ("mmWave") spectrum which, due to the spectrum's limited propagation characteristics, require ubiquitous small cells placed relatively close together.[23] Though some investor-owned utilities will argue that there is a difference between a

("*Gulf Power*"). Such interpretations are entitled to judicial deference. *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (where a statute is silent or ambiguous, the question for the Court is whether the agency has adopted "a permissible construction of the statute"); *Nat'l Cable & Telecomms Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (if the agency has read an ambiguous statute reasonably, a Court must "accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation").

[21] 47 U.S.C. § 224(f)(1); *see also id.* § 224(a)(4) (defining "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to *a pole*, duct, conduit, or right-of-way owned or controlled by a utility") (emphasis added).

[22] Further, utilities would still retain the right to deny access to light poles "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." *Id.* § 224(f)(2).

[23] *See, e.g.*, Peter Brown, "Micro 5G base stations on street lamps key to proliferating mmWave technology," *Electronics360* (Sept. 25, 2019), https://electronics360.globalspec.com/article-/14127/micro-5g-base-stations-on-street-lamps-key-to-proliferating-mmwave-technology ("Unlocking the potential of mmWave technology means that small 5G cells need to be placed all around in order to expand coverage and hopefully prevent blockage as much as possible. Installing small cell base stations onto street lamps is one potential step that is being explored to expand the range of mmWave technology. . . 'The nature of mmWave is the reason why we need to build so many base stations to ensure the effective coverage, and only by this short wave tech

pole with a luminaire and one without, this Commission has already made clear that such a distinction does not apply to municipally owned infrastructure. In the *Wireless Infrastructure Third R&O*, the Commission grouped together "property in the ROW, such as light poles, traffic lights, utility poles, and other similar property suitable for hosting Small Wireless Facilities."[24] It should do the same with investor-owned utility infrastructure. And, as CTIA notes, explicitly bringing light poles within the scope of Section 224 would be "consistent with the real-world practice of commingling street lights and communications attachments on the same poles."[25]

B. The Commission Should Reemphasize that Blanket Bans on Installations of Wireless Equipment on Utility Poles Are Prohibited.

The Commission should reiterate that Section 224 does not allow utilities to impose blanket prohibitions on installing wireless equipment, whether for parts of poles or the entirety of poles.[26] On this issue the Commission has been clear: "Blanket prohibitions are not permitted under the Commission's rules."[27] There is ample justification for this position. Indeed, the pole attachment procedures in the Commission's rules are grounded in part on the principle that a utility cannot issue generic denials of pole access. Instead, as codified in Section 224(f)(2) of the Act and Section 1.1403(b) of the Commission's rules, the utility must provide a prospective attacher with its precise reasons for denying the proposed attachment, and must further show that

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can we achieve high transmission rate' . . . . 'Street lamp poles happen to be a good carrier and the same can be said for security camera poles.'").

[24] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 30 FCC Rcd 9088, 9112-13 ¶ 50 (2018) (footnotes omitted) ("*Wireless Infrastructure Third R&O*").

[25] CTIA PDR at 23.

[26] *Id.* at 25.

[27] *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5276 ¶ 76 (2011) (footnote omitted) ("*2011 Pole Attachment R&O*").

those reasons are permissible (*i.e.*, they relate to lack of capacity, safety, reliability or engineering issues).[28] This improves communication between the attacher and the utility, discourages arbitrary denials of access, facilitates faster resolution of disputes, and ultimately promotes quicker deployment of wireless broadband facilities.[29] Further, nowhere in Section 224 did Congress give utilities the right to declare that portions of a pole are *per se* off limits. A utility must satisfy the Section 224(f)(2) exceptions for all portions of a pole, not just some of them. Further, if a utility allows other telecommunications carriers and cable providers to occupy any portion of the pole, a blanket prohibition denying the placement of small wireless facilities is *de facto* discrimination, prohibited by Section 224 and by Section 1.1403 of the Commission's rules. Where utilities prohibit small wireless facilities on poles (or associated equipment), it is not uncommon to find cable television and landline communications repeaters, "Alpha Boxes," power supplies, and other associated equipment on nearby poles.

C. Utilities Should Be Prohibited from Demanding Terms of Attachment that Do Not Comply with Section 224 or the Commission's Rules.

The Commission also should clarify that utilities are prohibited from demanding terms of attachment that conflict with Section 224 or the Commission's pole attachment rules.[30] As CTIA explains: "[W]ireless service and infrastructure providers continue to face utilities that

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[28] 47 U.S.C. § 224(f)(2); 47 C.F.R. § 1.1403(b). *See also 2011 Pole Attachment R&O* ¶ 75; *id.* ¶ 76 ("It is not sufficient for a utility to dismiss a request with a written description of its blanket concerns about a type of attachment or technology, or a generalized citation to section 224. . . Concerns that appear to be mere pretexts rather than legitimate reasons for denying statutory rights to access will be given serious scrutiny by the Commission, including in any complaint proceeding arising out of a denial of access.").

[29] *Id.* ¶ 76 ("We believe that this clarification regarding the specificity of denials will encourage communication and cooperation between utilities and wireless attachers, and thereby promote the deployment of and competition for telecommunications and broadband services.") (footnote omitted).

[30] CTIA PDR at 28.

demand terms that are inconsistent with the Commission's pole attachment rules. . . Rather than baldly demand that attachers waive legal rights granted under Section 224 and Commission rules, utilities condition their acceptance of terms the attacher seeks on the attacher's acceptance of other agreement terms that alter and weaken those rights."[31] The need for Commission intervention here is patent: a utility's regulatory obligations under Section 224 and the pole attachment rules have little meaning if the utility is permitted to use its negotiating leverage to ignore the statute and the rules via private contract.[32]

Moreover, the Commission's current remedy for this problem – the "sign and sue" rule – is not always a viable alternative. Under "sign and sue," an attacher may file a complaint challenging the lawfulness of terms in an executed pole attachment agreement that the attacher claims it was coerced to accept.[33] The rule was adopted "in recognition that in some situations, despite good faith efforts to reach agreement, an attacher may be forced to execute a pole attachment agreement containing what it believes to be unjust and unreasonable terms in order to gain timely access to the utility's poles."[34] There are instances of language in such agreements that can make further challenges difficult, such as "the parties entered into this Agreement

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[31] *Id.* at 29-30.

[32] In the *Wireline Infrastructure Third R&O*, the Commission stated that "parties are welcome to reach bargained solutions that differ from our rules." CTIA PDR at 30 (quoting *Wireline Infrastructure Third R&O*, 33 FCC Rcd at 7711 ¶ 13). This was not, however, an invitation for utilities to use their leverage to force attachers into sacrificing their rights under those rules. Rather, the Commission only stated that its rules "cannot account for every distinct situation," and thus encouraged parties "to seek superior solutions themselves through voluntary privately negotiated solutions." *Id.* An agreement in which an attacher is required to surrender its pole attachment rights as a *quid pro quo* for pole access is not a "superior solution," and the Commission's statements otherwise cannot be sensibly read as giving utilities the right to "negotiate" their way out of their Section 224 obligations.

[33] *2011 Pole Attachment R&O*, 26 FCC Rcd 5292 ¶ 119.

[34] *Id.* at 5294 ¶ 123 (footnote omitted).

voluntarily" or the licensee "acknowledges this Agreement to be a lawful and valid agreement between the Utility and Licensee." Moreover, requiring an attacher to file a complaint under these circumstances only empowers utilities to insist that the attacher trade away its pole attachment rights, because this effectively forces the attacher into the Hobson's choice of: (i) accepting an unreasonable agreement and enduring the delays and costs of subsequently litigating that agreement before the Commission, with no guarantee of a favorable resolution, or (ii) forgoing any access to the utility's poles at all until the utility changes its position. To ameliorate this problem, the Commission should make it clear that utilities may not force such agreements on attachers in the first place, and that such conduct is a *per se* violation of the Commission's pole attachment rules.[35]

II. THE COMMISSION SHOULD GRANT ADDITIONAL POLE ATTACHMENT RELIEF TO ADDRESS OTHER OBSTRUCTIVE UTILITY BEHAVIOR.

While a grant of the CTIA PDR is important, further related relief is needed. Such relief can and should be addressed in this proceeding, both to promote administrative efficiency and eliminate the wider range of obstructive utility behavior that is stalling deployment of wireless broadband facilities.

A. The Commission Should Clarify that a Wireless Pole Attachment Includes the Antenna and All Accessory Equipment.

The Commission should clarify that a wireless pole attachment includes not only the antenna but also all accessory equipment. Clarification is needed because some utilities, apparently relying on a narrow reading of the definition of "pole attachment" in Section

[35] In at least one other case, the Commission has found that complaints are inadequate to protect an attacher's pole attachment rights. *Wireline Infrastructure Third R&O*, 33 FCC Rcd at 7752 ¶ 98 ("We agree with commenters that argue that complaints are an important but insufficient tool for encouraging compliance with our deadlines and speeding broadband deployment.") (footnote omitted).

224(a)(4), have advised ExteNet that it may not attach any wireless equipment to a pole except for an antenna. As shown below, the utilities' position misreads Section 224 and Commission precedent. Further, this "interpretation" reads the capacity and "safety, reliability and engineering" exceptions in Section 224(f)(2) out of the statute, and denies ExteNet its right to attach its facilities on just and reasonable rates, terms and conditions under Section 224(b)(1). The Commission thus should declare that the utilities' reading of Section 224 is wrong.

A Wireless Attachment Consists of Multiple Pieces of Interrelated Equipment. For context, attached is a drawing of a typical ExteNet small cell deployment on a utility pole.[36] Typically attached to the pole are the following pieces of equipment: (1) an antenna, which is usually mounted on the top of the pole; (2) a radio unit, usually mounted below the lowest wire in the pole's communications space; (3) a meter measuring power consumption, also mounted below the communications space; (4) a shut-off switch, also below the communications space; (5) associated connectors and fiber; and (6) a riser to connect the node equipment below the communications space to the antenna at the pole top.

Each piece of equipment is necessary for proper and safe operation of the antenna. The radio unit, for example, amplifies, controls and processes signals for the antenna, which is essentially a "dumb pipe." The connectors (which may include diplexers and triplexers) connect the radio unit to the antenna. The riser is the conduit for the fiber and power connections between the radio unit and the antenna. The meter, which is required where ExteNet is unable to secure flat-rate electricity pricing, monitors power consumption. The shut-off switch is necessary to ensure that the antenna may be turned off in emergency situations or to avoid exposing utility workers in the electrical space to RF emissions. Because all of the equipment is

[36] *See* Attachment 1.

in some respect interrelated with the antenna, ExteNet does not distinguish between the antenna as "wireless equipment" and the accessory equipment as "non-wireless equipment." It is all "wireless equipment" that, collectively, constitutes a wireless node and thus should be attached to the same pole.

Section 224 Defines "Pole Attachment" Broadly. Under Section 224(f)(1), and subject to only limited exceptions, utilities must give providers of telecommunications services nondiscriminatory access to their poles.[37] In 1998, the Commission held that the statutory right of nondiscriminatory access includes attachments by wireless carriers.[38] Subsequently, in *Gulf Power*, the United States Supreme Court upheld the Commission's conclusion, and thus wireless telecommunications providers have pole attachment rights under Section 224.[39]

In determining what constitutes a wireless "pole attachment" under Section 224(a)(4), the Commission must first look to the text of the statute. Section 224(a)(4) defines a "pole attachment" to mean "*any attachment* by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[40] Section 224(a)(4)'s use of the term "any attachment," plus the absence of any limiting language in the statute, belies any suggestion that a wireless pole attachment must be limited to the antenna. Indeed, the Commission has recognized that a wireless attachment is not limited to the antenna. In its *Further Notice* in WC Docket No. 07-245, the Commission sought comment on developing timelines for Section 224 access other than for wired pole attachments, and on

[37] 47 U.S.C. § 224(f)(1).

[38] *Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 6777, 6798 ¶ 39 (1998).

[39] *Gulf Power*, 534 U.S. at 339-342.

[40] 47 U.S.C. § 224(a)(4) (emphasis added).

whether "the wired pole attachment timeline would be appropriate for wireless pole attachments (*i.e.*, antennas *and other wireless telecommunications equipment*)."[41]

Other provisions of Section 224 support a broad reading of "pole attachment." In Section 224(d)(2), for instance, "usable space" means "the space above the minimum grade level which can be used for the attachment of wires, cables, *and associated equipment.*"[42] Additional provisions refer to "pole attachments," "any pole attachment," or "an attachment," without narrowing the definition of "pole attachment" in Section 224(a)(4).[43]

Utilities also overlook the fact that Section 224(f)(2) already provides them with a remedy if a wireless provider's attachment of an antenna and accessory equipment is not feasible. Again, Section 224(f)(2) states that "a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles . . . on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." The Commission long ago advised that the feasibility of an attachment should be evaluated under the Section 224(f)(2) factors, as opposed to a blanket prohibition on specific types of equipment:

> The statute does not describe the specific type of telecommunications or cable equipment that may be attached when access to utility facilities is mandated. We do not believe that establishing such an exhaustive list of such equipment is advisable or even possible. We presume that the size, weight and other characteristics of attaching equipment have an impact on the utility's assessment of the factors determined by the statute to be pertinent – capacity, safety, reliability and engineering principles.

[41] *2011 Pole Attachment R&O*, 26 FCC Rcd at 5261 ¶ 41 (emphasis added) (footnote omitted).

[42] 47 U.S.C. § 224(d)(2) (emphasis added).

[43] *Id.* §§ 224(b)(1), 224(c)(1), 224(d)(3), 224(h) and 224(i).

> *The question of access should be decided based on those factors."*[44]

Finally, the utilities' narrow reading of "pole attachment" is at odds with the Commission's ongoing reform of its pole attachment rules. The rationale for that reform is clear: "Obtaining access to poles and other infrastructure is critical to deployment of telecommunications and broadband services. Therefore, to the extent that access to poles is more burdensome or expensive than necessary, it creates a significant obstacle to making service available and affordable."[45] The Commission has already made great strides towards, among other things, streamlining the pole attachment process and clarifying the obligations of attachers and pole owners to each other. Reading Section 224(a)(4)'s definition of "pole attachment" to exclude accessory equipment will only take the Commission backwards, re-creating precisely the sort of obstacles to deployment that pole attachment reform is intended to eliminate.

Excluding Accessory Equipment from the Definition of "Pole Attachment" Would Deny ExteNet Its Right to Attach Under Just and Reasonable Rates, Terms and Conditions. Absent state regulation, Section 224(b)(1) requires the Commission to "regulate the rates, terms and conditions for pole attachments to provide that such rates, terms and conditions are just and reasonable . . . ."[46] Denying ExteNet the right to attach its antenna and accessory equipment to the same utility pole forces ExteNet into alternative installation solutions that, even if achievable, cause delay and/or are unreasonably expensive. Such alternative solutions are neither just nor reasonable, and thus cannot be squared with Section 224(b)(1)'s "just and reasonable"

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[44] *Implementation of the Local Competition Provisions in the Telecommunications Act 1996*, *Local Competition Order*, First Report and Order, 11 FCC Rcd 15499, 16805 ¶ 1186 (emphasis added) (footnote omitted).

[45] *2011 Pole Attachment R&O*, 26 FCC Rcd at 5243 ¶ 6.

[46] 47 U.S.C. § 224(b)(1).

requirement. The Commission's definition of and conditions for "small wireless facilities," contained in its rules implementing Sections 332 of the Act and Section 6409(a) of the Spectrum Act of 2012, applies size and capacity restrictions to the antenna and "***[a]ll other wireless equipment . . . associated with the structure.***"[47] The definition makes clear that wireless equipment "includ[es] the wireless equipment associated with the antenna."[48] The same rationale should apply in the Section 224 context, and thus there should be no blanket exclusion of associated equipment from "the structure" for purposes of the Commission's pole attachment rules.

By way of example, a large investor-owned utility in the Houston area requires ExteNet's fiber and power riser to be attached via an eight-inch stand-off bracket, and further requires that all other node equipment (excluding the pole-top antenna) be located on the ground at least ten feet away from the node pole. This imposes the following burdens on ExteNet's DNS deployments:

- additional costs of ground-mounted equipment;
- additional permitting cost and time delay associated with obtaining municipal approval of ground-mounted equipment (which may include zoning approval);
- a potential need to place the ground equipment on private property where the public right of way lacks sufficient space, resulting in additional costs and time delays, and ongoing responsibilities;
- requirements that the ground-mounted equipment be landscaped;[49]
- possible relocation of node equipment to city-owned streetlight poles, at additional cost; and

[47] 47 C.F.R. § 1.6002(l)(3) (emphasis added).

[48] *Id.*

[49] Provided herewith as Attachment 2 are sample photographs of situations where ExteNet was required to ground mount its equipment and landscape the surrounding area.

- placement of ExteNet's own poles where suitable sites for ground-mounted equipment cannot be found.[50]

ExteNet's experience in Overland Park and Leawood, Kansas is a "real world" example of how the factors listed above stall DNS deployments. In those communities, placement of ground-mounted equipment required a 90-day zoning review. And, in several locations, ExteNet was required to obtain easements on private property where the public right of way lacked sufficient space for ExteNet's equipment. This required negotiations with a private landlord and, consequently, additional time and expense. The ground-mounted equipment also required municipal landscape plan review, installation of landscaping to shroud the ground-mounted equipment, and ongoing maintenance, at an estimated additional cost of $6,000 per site. In some locations ExteNet was permitted to locate nodes on city-owned streetlight poles, but at a higher annual attachment rate. For these types of installations, the local utility still required that the electric meter be located on a ground-mounted stub pole. As wireless providers are facing more and more municipal scrutiny, imposing such requirements to install ground equipment and stub poles in the right-of-way unnecessarily adds to the "aesthetic" concerns raised by many municipalities.

The scenarios described above are neither "just" nor "reasonable," because: (i) the local utility never indicated that attachment of ExteNet's accessory equipment to its poles raised any

[50] ExteNet has experienced similar problems with an investor-owned utility which operates in Kansas and Missouri (both Commission-regulated states). The utility does not permit any radios to be attached to any pole's communications space, and thus all of ExteNet's radios must be installed on ground furniture. In addition, the utility only allows ExteNet one pole-top antenna per pole. ExteNet thus cannot add new 5G antennas to pole tops without amending the existing pole attachment agreement and attachment standards. Another large investor-owned utility with operations in Maryland, New Jersey, Ohio, Pennsylvania, Virginia and West Virginia (three of which are Commission-regulated states) has imposed a blanket ban on attachment of any wireless equipment to its poles save for the antenna.

capacity, safety, reliability or engineering issues; (ii) ExteNet nonetheless was forced into alternative installation arrangements that substantially increased delay and costs; and (iii) such arrangements were not forced on wireline attachers to the utility's poles, even though their accessory equipment is typically the same size as or larger than that of ExteNet. Again, this sort of arbitrary, unbalanced treatment is exactly the opposite of what the Commission's pole attachment reform is supposed to achieve.

B. The Commission Should Declare that Commission-Regulated Pole Attachment Rates Apply to Replacement Poles.

The Commission should clarify that FCC-regulated pole attachment rates apply to replacement utility poles. This clarification is warranted because at least one utility has told ExteNet that it must pay market attachment rates when attaching its facilities to replacement poles, even where the original pole is subject to Commission-regulated rates and ExteNet agrees to pay the cost of the replacement pole. There is no support in Section 224 for this position, and to hold otherwise would undercut the Commission's pole attachment rate regulation scheme and the Commission's efforts to lower barriers to infrastructure deployment. Here again, the Commission should declare that the utility's position is wrong.

The Commission has recognized that "pole replacements are often required to support small cell facilities, which increasingly will be needed to support the rollout of next-generation services."[51] While use of existing utility poles is the most efficient path to deployment, pole replacement is required when existing utility poles cannot support additional equipment.[52] "Wooden utility poles, in particular, frequently need to be replaced because of their age and

[51] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, 32 FCC Rcd 9760, 9765 ¶ 12 (2017).

[52] *Id.* ¶ 13.

condition."[53] In addition, pole replacement is often necessary where existing poles are not tall enough to accommodate wireless pole-top attachments. Thus, pole replacement has become a fairly standard procedure in ExteNet's deployments, with ExteNet normally bearing the cost of the replacement pole. And, consistent with Section 224, ExteNet normally pays Commission-regulated rates when attaching its facilities to replacement poles in Commission-regulated states.

At the same time, a large investor-owned utility in Missouri has advised ExteNet that Commission-regulated rates do not apply to replacement poles, even where the original pole is subject to regulated rates and ExteNet agrees to pay for the cost of the replacement pole. The utility's attachment rate for a replacement pole is $1,500 per year. This is more than ten times the regulated rate that ExteNet pays to the other large investor-owned utility in the state, *i.e.*, $115 per year. It is even larger than the rate ExteNet pays to the utility's affiliate in Illinois ($1,200) which, unlike Missouri, is not a Commission-regulated state. Utilities that subscribe to this belief also do not define when a replacement pole becomes subject to regulated rates – over time, that pole at some point ceases to be a "replacement" pole. If another communications provider seeks to attach fiber to that "replacement" pole six months later, and is charged a regulated rate, such would be illegally discriminatory against ExteNet.

It is unclear where the utility's argument comes from – Section 224 does not draw any distinction between original poles and replacement poles. Section 224(b)(1), for example, directs the Commission to regulate rates for "pole *attachments*," without regard to whether the attachment is affixed to a replacement pole.[54] Section 224(i) states that an entity that obtains an

[53] *Id.*

[54] 47 U.S.C. § 224(b)(1).

attachment to "a pole" shall not be required to bear certain make-ready costs.[55] Section 224(f)(1) requires a utility to provide a telecommunications carrier with nondiscriminatory access to "*any* pole . . .. owned or controlled by it."[56]

Also, Section 224 already includes exclusions from rate regulation in a number of other cases (e.g., municipally owned utilities, utilities in "certified" states etc.) – had Congress wanted to carve out an exclusion for replacement poles, it presumably would have done so. Indeed, the Commission's statutorily mandated regulation of pole attachment rates would be eviscerated if utilities could escape such regulation merely by putting up replacement poles that perform the same function in the same location as their original poles.[57]

Excluding replacement poles from Commission-regulated attachment rates would also undermine the Commission's efforts to lower barriers to deployment of new wireless services. If replacement poles are not subject to regulated rates, a DNS provider's pole attachment costs could vary significantly within a single deployment, with "original" poles subject to regulated rates but then subject to market rates once they are replaced. And, as shown above, the difference between regulated rates and market rates can be substantial. The Commission's pole attachment reform is designed to lower deployment costs and lend more predictability to the pole attachment process. Subjecting DNS deployments to a checkerboard of widely divergent regulated and unregulated pole attachment rates does neither. For all these reasons, the

[55] *Id.* § 224(i).

[56] *Id*. § 224(f)(1) (emphasis added).

[57] It is logical that Congress carved out no exclusion for pole replacement, since it results in no net change to a utility's facilities – it merely substitutes one pole for another. As such, pole replacement is more akin to collocation than construction of new infrastructure.

Commission should declare that Commission-regulated pole attachment rates apply to replacement poles.

C. The Commission Should Confirm that Rates for Strand-Mounted Antennas Must Be Based on the Actual Amount of Pole Space Occupied.

The Commission should confirm that Section 224 only permits utilities to charge rates for strand-mounted antennas based on the actual amount of pole space occupied. In some deployments ExteNet utilizes strand-mounted antennas, in which the antenna is not affixed to the pole. The only items attached to the pole are the fiber strand on which the antenna is mounted, plus a stabilizing arm to hold the mount in place.[58] This results in smaller space occupancy on the pole, and thus should result in a lower attachment rate. The Commission should clarify that this is the correct reading of Section 224, and that the statute only permits utilities to charge rates for strand-mounted attachments based on the actual amount of pole space occupied.

Some utilities are charging ExteNet excessively high rates for strand-mounted antennas, on the theory that the antenna should be treated as if it were affixed to the pole. Here again, there is no support in Section 224 for the utilities' position. The statute's rate formulas, as implemented by the Commission's rules, are based on the amount of pole space an attachment actually occupies, not the amount of space hypothesized by a utility.[59] For example, Section 1.1406(b) of the rules states that a pole attachment rate is just and reasonable if is allows a utility to recover no more than "an amount determined by multiplying the percentage of the total usable

[58] See Attachment 3 (sample photograph of a strand-mounted antenna).

[59] *See, e.g., Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Order, 77 FCC 2d 187, 190 ¶ 8 (1980) ("[W]e believe when Congress adopted [the Pole Attachments Act of 1978] it intended the space attributable to cable television to be 12 inches, including *actual space occupied* plus a clearance space.") (emphasis added) (footnote omitted).

space . . . *which is occupied by the pole attachment* by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole . . . ."[60] Correspondingly, the Commission's pole attachment rate formulas for telecommunications carriers incorporate a space factor which is calculated in part based on "space occupied."[61] The ruling requested by ExteNet thus is necessary to ensure that the Commission's rate formulas are applied in a consistent manner, and to eliminate any doubts about this issue.

III. THE COMMISSION SHOULD GRANT THE SECTION 6409(a) RELIEF REQUESTED BY CTIA AND WIA.

ExteNet generally endorses the Section 6409(a) relief requested in the CTIA PDR, the WIA PDR and the WIA PFR. All three filings identify a variety of ways that local communities prevent the expedited approval of EFRs, delaying deployments and contravening Congressional intent.[62] Commission intervention is needed to emphasize that such tactics are not permissible and may be subject to Commission sanction.

CTIA's and WIA's requested Section 6409(a) relief and the arguments supporting it are detailed in their respective filings and will not be repeated here. ExteNet wishes, however, to highlight two specific points. First, the Commission should make it clear that Section 6409(a) and the Commission's implementing regulations apply to *all* state and local authorizations required to deploy new or replacement transmission equipment on existing wireless towers or base stations, including poles with an existing approved antenna.[63] This clarification is needed

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[60] 47 C.F.R. § 1.1406(b) (emphasis added).

[61] *Id.* § 1.1406(d)(2).

[62] *See, e.g.*, WIA PDR at 2 ("[D]espite the Commission's best intentions, certain jurisdictions continue to misapply Section 6409(a) and/or are still acting in ways that circumvent the protections afforded by Section 6409(a).").

[63] *Id.* at 4. ExteNet also agrees that, if a deemed granted notice is not timely challenged by a locality in court within 30 days, a wireless provider should be legally authorized to move

to counteract the dilatory approach of some localities, who either claim that the 60-day Section 6409(a) shot clock does not apply to ancillary authorizations necessary for deployment (*e.g.*, those required under building, structural, electrical and safety codes) or apply a separate shot clock to each such authorization.[64] Also, the Commission has already granted such relief in the Section 332 context to facilitate timely deployment of wireless facilities.[65] Doing so for Section 6409(a) facilities modifications will achieve the same result while promoting regulatory certainty and consistency across the Commission's rules and policies regarding infrastructure investment.

Second, as requested in the WIA PFR, the Commission should amend its rules to provide that all local government fees charged for processing EFRs must be based on reasonable approximations of reasonable costs.[66] The Commission has already ruled that local government fees imposed on small cell deployments, including "one-time application and review fees," must be cost-based and non-discriminatory.[67] As pointed out by WIA, "the Commission determined that fees that are not cost-based materially inhibit the ability of an entity to compete in violation of Sections 253 or 332(c)(7)."[68] So it is with local review of EFRs for the provision of telecommunications or personal wireless services under Section 6409(a). Indeed, WIA reports that local governments are charging as much as $10,000 (or more) for EFR review.[69] Such fees

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forward with construction and deployment even if the locality refuses to issue building and other permits technically required under local regulations. *Id.* at 7.

[64] *Id.* at 5-6.

[65] *Id.* at 6 (discussing *Wireless Infrastructure Third R&O*).

[66] WIA PFR at 11-13.

[67] *Id.* at 11-12 (citing *Wireless Infrastructure Third R&O*, 30 FCC Rcd at 9089-91 and 9110-9130).

[68] WIA PFR at 12 (footnote omitted).

[69] *Id.*

(particularly when multiplied across numerous localities) materially increase of the cost of deployment and, as in the case of Sections 253 and 332(c)(7), require Commission intervention at this time.[70]

IV. CONCLUSION

ExteNet commends the Commission for its unprecedented efforts to ensure that utilities and local governments do not unduly interfere with wireless broadband deployment. Unfortunately, the CTIA and WIA filings, and ExteNet's own experience, indicate that more remains to be done. ExteNet thus asks that the Commission grant the CTIA PDR, the WIA PDR and the WIA PDR, as well as the additional pole attachment relief requested in these comments.

Respectfully submitted,

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Dated: October 29, 2019

[70] As noted above, ExteNet's deployments may fall within the Section 6409(a) or Section 332 "buckets." Therefore, where issues related to timing and fees are concerned, localities should not be permitted to do under Section 6409(a) what they are not permitted to do under Section 332, as both statutes bear directly on speed and cost of deployment.

ATTACHMENT 1

Node Information	Radio Information	
Name	Band	Model
Minneapolis Node 9	PCS	ALU RRU B25 RRH4X30 (2x60W)
	PCS	ALU RRU B25 RRH4X30 (2x60W)

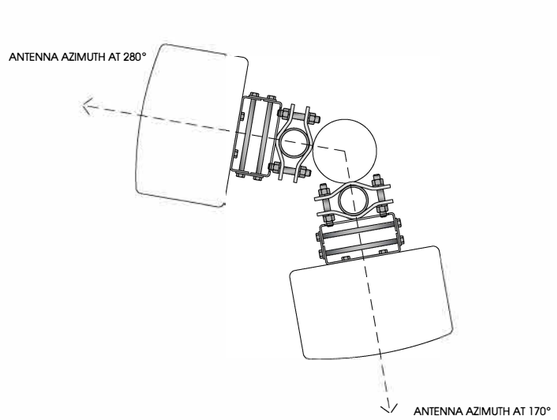
Antenna Information				
Azimuth	Qty	Mfr.	Model	C/L
170	1	CCI	HPA-65F-BUU-H2	33'
280	1	CCI	HPA-65F-BUU-H2	33'

Coax Information					
Qty	Type	Mfr.	Model	Dia.	Run
1	Jumper	TBD	TBD	TBD	TBD
1	Jumper	TBD	TBD	TBD	TBD
1	Jumper	TBD	TBD	TBD	TBD
1	Jumper	TBD	TBD	TBD	TBD

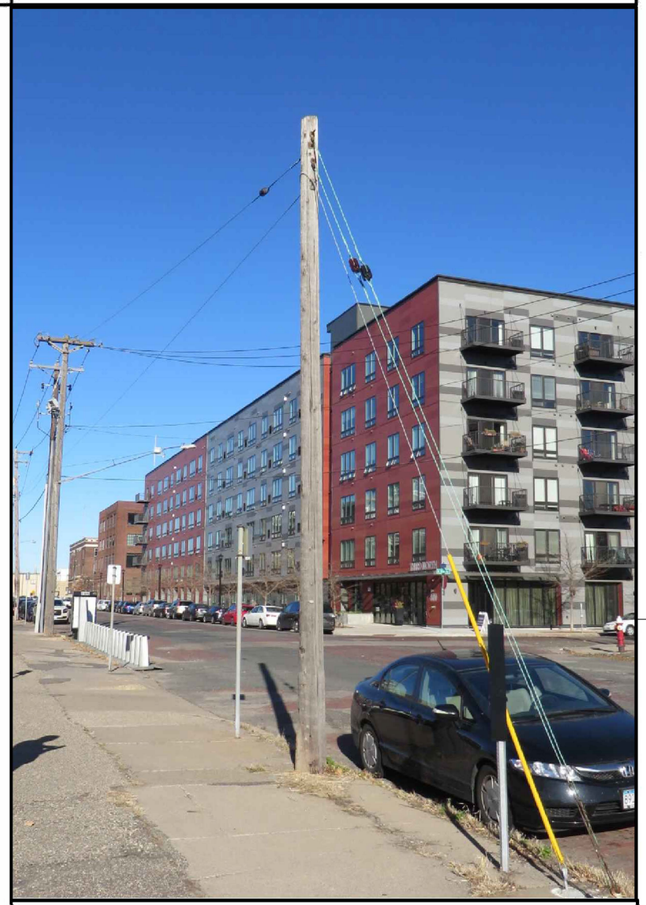
A **ANTENNA AND COAX**
SCALE: NTS

B **RF SIGNAGE**
SCALE: NTS

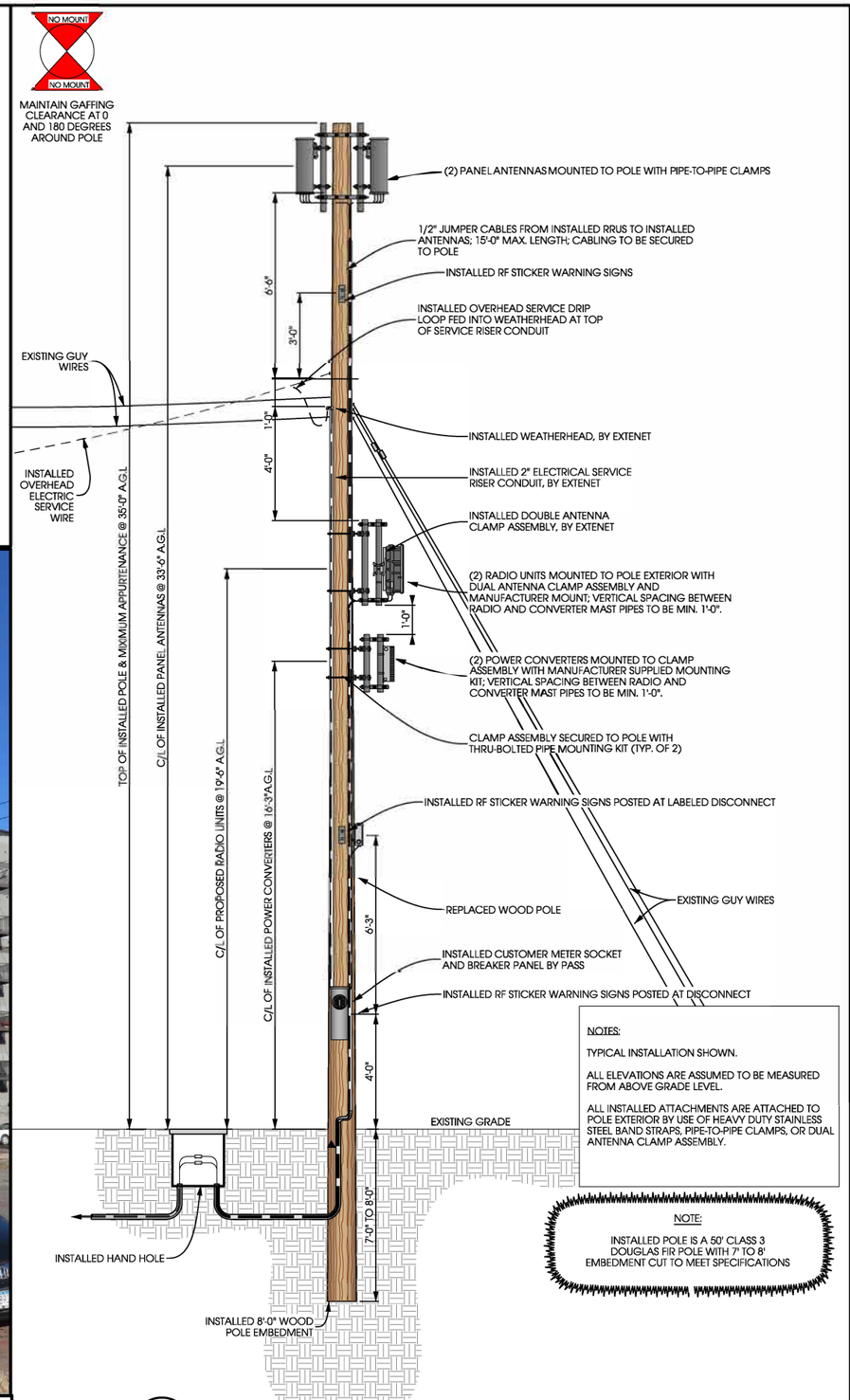
NORTH



A **ANTENNA ORIENTATION**
SCALE: NTS



WOOD POLE ELEVATION



NOTES:

TYPICAL INSTALLATION SHOWN.

ALL ELEVATIONS ARE ASSUMED TO BE MEASURED FROM ABOVE GRADE LEVEL.

ALL INSTALLED ATTACHMENTS ARE ATTACHED TO POLE EXTERIOR BY USE OF HEAVY DUTY STAINLESS STEEL BAND STRAPS, PIPE-TO-PIPE CLAMPS, OR DUAL ANTENNA CLAMP ASSEMBLY.

NOTE:

INSTALLED POLE IS A 50' CLASS 3 DOUGLAS FIR POLE WITH 7' TO 8' EMBEDMENT CUT TO MEET SPECIFICATIONS

D **WOOD POLE ELEVATION**
SCALE: 11" x 17" - 1" = 5'-0"
22" x 34" - 1" = 2'-6"

extenet SYSTEMS

Edge
Consulting Engineers, Inc.
17645 Juniper Path, Suite 105
Lakeville, MN 55044
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608.644.1549 fax
www.edgeconsult.com

EXTENET NAME:	NC-MN-MINNATT1-09
EDGE PROJECT NO:	15230
DRAWN BY:	PER
CHECKED BY:	OGD

REV.	DATE	DESCRIPTION	
A	12/27/2016	PRELIM SMALL CELL DWGS	PER
0	12/28/2016	FINAL SMALL CELL DWGS	PER
1	01/12/2017	FINAL SMALL CELL DWGS	PER
2	01/27/2017	FINAL SMALL CELL DWGS	PER
3	02/03/2017	FINAL SMALL CELL DWGS	PER
4	03/20/2017	FINAL SMALL CELL DWGS	AJB
AB	01/23/2018	AS BUILT SMALL CELL DWGS	MWH

AS-BUILT DRAWINGS

I HEREBY CERTIFY THAT THIS PLAN, SPECIFICATION, OR REPORT WAS PREPARED BY ME OR UNDER MY DIRECT SUPERVISION AND THAT I AM A DULY LICENSED PROFESSIONAL ENGINEER UNDER THE LAWS OF THE STATE OF MINNESOTA.

WAREHOUSE 3RD ST LOFTS
MINNEAPOLIS, MINNESOTA
REPLACED WOOD POLE
SMALL CELL DRAWINGS

SHEET TITLE
POLE ELEVATION

SHEET NUMBER
A-1

L:\15200\15230\CAD\Plot\As Builts\A-1_elev.dgn

ATTACHMENT 2

ATTACHMENT 3